

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant suffered accidental injury on June 24, 1995, while lifting a resident from a bed to a chair in respondent's nursing home. Claimant experienced low back pain with radiculopathy into her right leg for a substantial period of time. She received conservative treatment from David O. King, D.O., an orthopedic surgeon, who last examined her on December 21, 1995. He assessed claimant a 5 percent whole body functional impairment. Dr. King found claimant to be self limiting and felt she was putting forth less than maximum effort during his examination.

Claimant also underwent a functional capacity evaluation during which time the evaluator felt claimant was putting forth less than maximum effort.

Claimant was examined by Dr. James Armstrong, an orthopedic surgeon, during an independent medical examination on August 27, 1996. Dr. Armstrong also felt claimant was self limiting in her behavior, although he did note an MRI and x-rays indicated a slight bulge at L4-5 and long standing degenerative disc disease in claimant's low back. He assessed claimant no functional impairment as a result of these injuries.

Claimant was examined at her attorney's request by Dr. Revis Lewis, a neurosurgeon, on September 8, 1995. Dr. Lewis suggested claimant undergo an MRI which she did. He diagnosed a bulging disc at L4-5 and degenerative disc disease at L-4 through S-1. He assessed claimant a 15 to 20 percent whole body functional impairment.

Claimant continued with conservative care and was ultimately referred to Dr. William Dillon, an orthopedic surgeon, in April 1996. He reviewed claimant's tests and recommended surgery to repair what he diagnosed as a partially herniated disc at L4-5. He performed a partial laminectomy and excision in August 1997 and returned claimant to work with limitations shortly thereafter. At the time of the regular hearing on September 24, 1997, claimant had returned to work with respondent and was working in an accommodated position at a comparable wage.

It is noted that respondent's facility closed on October 31, 1997, at which time claimant obtained a job doing the same type of work, at a comparable wage, with Park Place Healthcare & Rehabilitation Center.

Conclusions of Law

K.S.A. 44-510e states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

K.S.A. 44-510e goes on to state in part:

An employee shall not be entitled to received permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant's average weekly wage on the date of accident was stipulated to be \$137.40. Claimant was only working approximately 20 hours a week at the time of the injury. After the surgery, claimant returned to work, in an accommodated position with respondent, for a period of several months earning \$6.25 per hour and working full time. Both claimant's employment with respondent and her current employment with Park Place Healthcare & Rehabilitation Center are at a wage which meets or exceeds the average weekly wage claimant was earning at the time of the injury. Therefore, claimant is not entitled to a work disability beyond her functional impairment as she is engaging in work for wages equal to 90 percent or more of the average weekly wage she was earning at the time of the injury.

In considering the claimant's entitlement to functional impairment, the Appeals Board notes that the only doctor who had the opportunity to examine and treat claimant subsequent to the surgery is Dr. Dillon. Dr. Dillon felt claimant had suffered a 10 percent whole body functional impairment as a result of the injury and resulting surgery. The Administrative Law Judge, in awarding claimant a 10 percent functional impairment, noted that Dr. Dillon was in the best position to evaluate the totality of claimant's condition. The Appeals Board agrees with the analysis presented by the Administrative Law Judge and affirms the award of a 10 percent whole body functional impairment as a result of the injuries suffered on June 24, 1995.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated January 26, 1998, should be, and is hereby, affirmed and an award is granted in favor of the claimant, Mary L. Samson,

against the respondent, Arolyn Heights Nursing Home, and its insurance carrier, GAB Robins North America, for an accidental injury occurring on June 24, 1995, based upon an average weekly wage of \$137.40 for a 10 percent whole body functional disability.

Claimant is entitled to 26.71 weeks temporary total disability compensation at the rate of \$91.60 per week totalling \$2,446.64, followed by 40.33 weeks permanent partial disability compensation at the rate of \$91.60 per week, totalling \$3,694.23 for a 10 percent permanent partial general body disability, making a total award of \$6,140.87. As of April 21, 1998, the entire award would be due and owing and ordered paid in one lump sum minus amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Donald J. Fritschie, Overland Park, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director